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Supreme Court, U.S.
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No. 07-325

In the

Supreme Court of the United States

ANN MARIE AND NICHOLAS PORTO, on behalf of SC, a minor person with a disability,

Petitioners,

v.

TOWN OF TEWKSBURY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the deliberate indifference standard used to determine the reasonableness of a school's response to sexual harassment under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, requires consideration of the special needs of children with disabilities.

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PETITION FOR A WRIT OF CERTIORARI

SC, a minor person with a disability, by and through his legal guardians, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the First Circuit Court of Appeals is reported at 488 F.3d 67 (1st Cir. 2007) and reprinted in Appendix A ("App. A"). The memorandum and order of the district court entered on April 28, 2006 and is not reported. It is reprinted in Appendix B ("App. B").

JURISDICTION

The judgment of the First Circuit Court of Appeals entered on May 30, 2006. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it was filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1681(a) of Title 20, United States Code, provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

This petition presents an important question that affects the rights of children with disabilities to be free from sexual harassment under Title IX of the Education Amendments of 1972; that is, whether a school system's response to sexual harassment under the deliberate indifference standard set forth in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999), requires consideration of a child's special needs.

This is *not* a case in which Petitioner seeks to modify or to extend the stringent standard articulated by this Court for deliberate indifference. The standard is clearly defined: "Funding recipients are deemed deliberately indifferent to acts of student-on-student harassment only where the recipient's response to harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. This high standard is necessary to balance a state's right to teach and to supervise children with the federal interest in ensuring that funding recipients maintain an academic environment free of gender discrimination.

The crucial question presented is whether a student's disability is a "known circumstance" that must be considered to effectively determine the appropriateness of a school's response to sexual harassment. This is an important question that affects the civil rights of children with disabilities receiving special education in public schools. Indeed, Congress and the Supreme Court have long recognized the unique needs of children with disabilities and the importance of equal educational opportunities for persons with disabilities. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

The First Circuit failed to take into account SC's significant limitations in its analysis of the school's response to sexual harassment. Because the decision below presents an important question that threatens to undermine a fundamental protection against sex discrimination for children with disabilities in all federally funded educational settings, this Court should grant certiorari review.

A. Background

1. Section 901 of Title IX provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a federally funded education program or activity "on the basis of sex." 20 U.S.C. § 1681(a). The Supreme Court has held that this general prohibition is to be construed broadly, *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), and protects individuals against student-on-student sexual harassment. *Davis*, 526 U.S. 629.

Section 902 of Title IX authorizes all federal agencies that fund educational activities to issue regulations implementing the substantive provisions of the statute. 20 U.S.C. § 1682. Under that authority, the Department of Education ("Dept. of Ed.") has made it clear that sexual harassment is not restricted to circumstances in which the harasser only harasses members of the opposite sex. *See* 34 C.F.R. 106.31. This Court relied on *Oncale v. Sundowner Industries*, 523 U.S. 75 (1998), a Title VII same-sex harassment case, for the test used to prove actionable sexual harassment in an educational setting. *Davis*, 526 U.S. at 651.

2. SC entered the Tewksbury public schools when he was eight years old. App. A, 3a. SC was quickly placed in a special education program where he remained

for the duration of his education in the Tewksbury school system. *Id.* The Massachusetts Dept. of Ed. identified SC as being developmentally and mentally disabled. *Id.* SC has Fetal Alcohol Syndrome, severely delayed cognitive abilities, moderate mental retardation and delayed expressive and receptive language skills. *Id.*; C.A.App. 1694-1696, 2649.[1] The district court characterized SC as "profoundly mentally impaired." App. B, 19a.

The Portos, as SC's legal guardians, claim that he was the victim of severe and pervasive sexual harassment by a classmate, RC, including three incidents of inappropriate fondling in October 2000 and sexual intercourse in a school bathroom in January 2001. App. A, 4a-6a. At the time of the January 2001 molestation, the school was aware of a prior history of sexual assault against SC by the same boy. In March 1999, Mrs. Porto reported to school officials that RC was involved in oral sex with SC on the school bus. *Id.*

Consequently, the school principal issued a written directive to teachers and aides to keep SC and RC separated and to monitor their interaction. App. A, 4a; C.A.App. 2243. The boys were not allowed to travel alone together inside or outside the school building. App. A, 9a; C.A.App. 2243. This information was passed along from the elementary school to SC's educational team and to middle school teacher Eleanor Edelstein when SC entered the seventh grade. C.A.App. 1162-1163.

The Portos claim that the school was deliberately indifferent because of the known history of sexual

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[1] "C.A.App." refers to the appendix submitted to the First Circuit Court of Appeals.

harassment, because of SC's inability to protect himself by virtue of his disability and because the school failed to adhere to its own mandate to separate and monitor the boys. The Portos contend that the harassment was so severe, pervasive and objectively offensive that it deprived SC of equal access to educational opportunities and benefits.

B. District Court Proceedings

The Portos filed suit against Tewksbury on January 5, 2004 alleging that Tewksbury was deliberately indifferent to RC's sexual harassment of SC in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. The case proceeded to a jury trial. At the conclusion of the Portos' case, Tewksbury moved for a directed verdict pursuant to Fed. R. Civ. P. 50(a)." App. A, 6a-6b.

The district court denied the motion, and the jury returned a verdict in favor of SC awarding $250,000 in compensatory damages and $1 in punitive damages. App. A, 18a. Tewksbury then filed a motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b), based in part on the contention that the Portos had failed to satisfy their burden on any element of the case. App. A, 7a. The district court denied the motion by written order on April 28, 2006. App. B. The court held that there was sufficient evidence in the record to support the conclusion that SC was subject to unwelcome sexual harassment. The evidence included SC's declaration that he felt forced to engage in sexual acts with RC out of fear that RC would beat him up or tell other students that he was gay. App. B, 20a.

C. Court of Appeals Proceedings

Respondent appealed the district court judgment to the First Circuit. The court of appeals reviewed the denial of Tewksbury's motion for judgment notwithstanding the verdict. App. A. The appeals court "assum[ed] (without deciding) that [SC] was subject to severe, pervasive, and objectively offensive harassment [by a peer], that Tewksbury is a funding recipient and had actual knowledge in 2001 of at least some prior incidents of inappropriate sexual behavior, and that the harassment deprived [SC] of educational opportunities and benefits." App. A, 9a. These assumptions were valid, given the jury verdict and factual findings of the district court. App. B.

The appeals court reversed based upon a finding that the evidence failed, as a matter of law, to demonstrate that Tewksbury acted with deliberate indifference. App. A, 15a. The court defined deliberate indifference in the Title IX context: "Funding recipients are deemed deliberately indifferent to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." App. A, 10a; *Davis*, 526 U.S. at 648. The appeals court also relied upon Supreme Court and Circuit Court precedent requiring proof that a municipal actor disregarded a "known or obvious consequence" or a "highly predictable consequence" of his action or inaction. App. A, 10a; *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

The court's analysis focused solely on the actions taken by the school, without regard to SC's disability.

REASONS FOR GRANTING THE WRIT

This case presents an important issue that reflects the public interest in protecting children with disabilities from sexual harassment in education. The First Circuit applied the deliberate indifference standard under Title IX without consideration of SC's disability. The exclusion of a child's disability from the analysis has a significant, negative impact on a large segment of society.[2] It is inconsistent with established disability discrimination and special education laws and serves to diminish the civil rights of children with disabilities.

I. TITLE IX MUST AFFORD CHILDREN WITH DISABILITIES PROTECTION AGAINST SEXUAL HARASSMENT

Title IX of the Education Amendments of 1972 provides in pertinent part: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). The Supreme Court held that to

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[2] There are 51.2 million people in America with a disability. They represent 18 percent of the population. U.S. Census Bureau, *Facts for Features & Special Editions, Americans with Disabilities Act: July 26,* May 29, 2007, available at http://www.census.gov/Press Release/www/2007/cb07ff-10.pdf (last visited August 27, 2007).

establish liability for peer harassment under Title IX, a plaintiff must demonstrate that the school district was deliberately indifferent to sexual harassment of which it had actual knowledge, and that the harassment was so severe, pervasive and objectively offensive that it deprived the victim of equal access to the educational opportunities or benefits provided by the school. *Davis*, 526 U.S. at 650.

Consideration of a child's special needs is required to guarantee effective pr tection under Title IX for children with disabilities. Children with disabilities are least able to protect themselves from sexual harassment.[3] The Title IX standard contemplates the impact of a child's disability: Proof of a hostile school environment "depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, 523 U.S. at 82; *Davis*, 526 U.S. at 651. A student's capacity to understand is an important consideration in evaluating sexual harassment. Dept. of Ed., Office of Civil Rights, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 62 Fed.Reg. 12034, 12040 (March 13, 1997).

The right to protection against discrimination for individuals with disabilities in educational services,

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[3] It is estimated that children with disabilities are four to ten times more vulnerable to sexual abuse than their non-disabled peers. Nora Baladerian, *ARCH Fact Sheet No. 36, Abuse and Neglect of Children with Disabilities*, National Resource Center for Respite and Crisis Care Services, Sept. 1994, http://www.archrespite.org/archfs36.htm (last visited August 27, 2007).

programs and activities is well-established. Congress enacted the Americans with Disabilities Act, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), "to place those with disabilities on equal footing." *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996). They provide the right to enjoy access to education and other benefits as if not disabled. *Berg v. Florida Dep't of Labor & Employment Security*, 163 F.3d 1251 (11th Cir. 1998). However, these statutes do not provide a remedy for peer sexual harassment. Title IX is the exclusive remedy.

The Individuals With Disabilities Act ("IDEA") is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for [disabled] children. Individuals With Disabilities Education Act, Pub. L. No. 91-230, Title VI, § 601, 84 Stat. 121 (codified as amended, 20 U.S.C. 1400 *et. seq.* (2000 & Supp. IV 2004). Each child is assured a program of special education and related services designed to meet the child's unique needs. However, the IDEA provides no private right of action for sexual harassment.

Title IX must be applied to children with disabilities consistent with Congress' anti-discrimination mandate. Thus, a school's response to sexual harassment requires contemplation of a child's special needs. The effectiveness of the remedy depends upon it. A reviewing court has an obligation to evaluate the reasonableness of a school's response in light of the child's handicap to ensure children with disabilities the protections afforded by Title IX.

II. THE FIRST CIRCUIT'S FAILURE TO CONSIDER *DISABILITY* IN EVALUATING THE SCHOOL'S RESPONSE TO SEXUAL HARASSMENT DENIED SC PROTECTION UNDER TITLE IX

A. The Nature and Extent of SC's Disability Is a Significant Known Circumstance Under the Deliberate Indifference Analysis

SC was deprived of his Title IX rights when the First Circuit failed to consider his disability in the deliberate indifference analysis. The court identifies, by way of background only, that SC has Fetal Alcohol Syndrome and "generalized developmental delays." App. A, 3a. SC has severely delayed cognitive abilities, moderate mental retardation and delayed expressive and receptive language skills. C.A.App. 1694-1696, 2649. The district court characterized SC as "profoundly mentally impaired." App. B, 19a. The court of appeals failed to recognize the relevance of SC's limitations to Tewksbury's action or lack thereof under the deliberate indifference analysis. App. A, 10a-15a.

Under Title IX, the reasonableness of the school's response to sexual harassment is determined based upon the "known circumstances." *Davis*, 526 U.S. at 648. SC's disability is a "known circumstance" essential to the deliberate indifference analysis. SC was a low functioning student with an IQ of 62. C.A.App. 1694. He had a difficult time with social relationships. C.A.App. 1694. He was unable to understand or adequately respond to what was happening to him or to determine the result of his decisions. C.A.App. 1693-1695.

SC's placement in a special education classroom underscores the need to consider his disability. His educational program is designed under the IDEA based upon his special needs, and the school is required to accommodate his disability under the ADA. 42 U.S.C. § 12131(2). The court had a similar obligation to evaluate Tewksbury's response to sexual harassment in light of the most significant known circumstance, the child's mental handicap. Had the appeals court done so, a finding of deliberate indifference would have been inescapable.

Reviewing the *same facts* analyzed by the First Circuit, but with SC's limitations in mind, it is unmistakable that the school disregarded a "highly predictable consequence" of its actions and inaction.

B. Consideration of SC's Disability Renders Tewksbury's Response to Sexual Harassment Clearly Unreasonable in Light of the Known Circumstances

The court of appeals deemed Tewksbury's response to sexual harassment effective without regard to SC's disability and contrary to the Portos' claim, and the district court findings, that the school should have done more. App. B. The core of the Portos' claim is that SC is a child with a disability and, therefore, cannot protect himself. The nature and extent of SC's disability, as well as a known history of prolonged sexual abuse by the same perpetrator, made it highly predictable that SC would be victimized again in the absence of close supervision.

This is an extreme case easily differentiated from mere teasing or name-calling. In this case, fear and intimidation resulted in unwelcome sexual acts involving two mentally impaired children. SC reported that he felt

forced to engage in sexual acts with RC out of fear that RC would beat him up or tell other students that he was gay. App. B, 20a. The behavior reviewed by the court included oral sex on the school bus in March 1999,[4] three separate incidents of fondling[5] during class in October 2000 and sexual intercourse in the school bathroom in January 2001. App. A, 4a-6a. The history of sexual abuse on the school bus was considered solely for the purpose of proving that Tewksbury had knowledge that harassment was likely to occur between RC and SC. App. A, 4a, n.1.

The deliberate indifference standard requires that the court assess the reasonableness of Tewksbury's response to sexual harassment. In its analysis, the court considered the following: After the March 1999 school bus incident, the boys were placed on separate school buses, but remained in the same classroom. App. A, 4a. The school principal issued a written directive to teachers and aides to keep SC and RC separated and to monitor their interaction. App. A, 4a; C.A.App. 2243. The boys were not allowed to travel alone together inside or outside the school building. App. A, 9a; C.A.App. 2243. After the first and second occurrences of fondling in October 2000, the boys were separated again. App. A, 5a. After the third incident in October 2000, they met *once* with William Traveis, the school guidance counselor. C.A.App. 1372-

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[4] As a result of the March 1999 incident, school principal Loreen Bradley filed a child abuse and neglect report with the Massachusetts Department of Social Services alleging the sexual abuse of SC by RC. C.A.App. 1257; C.A.App. 2244.

[5] In October 2000, behavior specialist Robert Ware reported and documented that "SC claimed RC fondled him." C.A.App. 1288. SC also reported that RC "would always try to touch" his private parts. App. B, 20a.

1374. Traveis told teachers and aides to monitor the boys and keep them separated. App. A, 5a; C.A.App. 1372-1374.

After October 2000, SC and RC were nonetheless allowed unsupervised access to each other. App. A, 9a. They were not escorted to the bathroom, to the locker or to gym class. C.A.App. 1546, 2504. In January 2001, the boys were discovered alone in the school bathroom. SC reported that he had unwillingly engaged in sexual intercourse with RC. App. A, 6a; App. B. 20a, 23a. It is commonly known among teachers and administrators that children with mental retardation are at increased risk of abuse, sexual abuse and harassment. C.A.App. 1699. Yet the classroom teacher, Eleanor Edelstein, allowed SC and RC to travel to the bathroom and to the locker unattended. App. A, 9a. The court found Tewksbury's response to the October incidents of sexual harassment to be reasonable, even though Edelstein did not follow Traveis's directive to monitor SC and separate him from RC.

The court did not consider SC's disability a relevant factor in determining deliberate indifference and focused instead on trustworthiness as justification for Edelstein's lapse in supervision. The court reasoned that "there was no evidence presented at trial to suggest that Tewksbury knew or even suspected that when SC asked to go to his locker, he was really going to the bathroom to meet RC"; that the boys had never given a "reason for [the teacher] to ever question that they couldn't be trusted going to the bathroom or going to a locker"; and that she "trusted that they would follow the rules." App. A, 12a. The Court also found "no evidence that the school knew or that it was obvious that RC would continue to sexually harass SC after October 2000. App. A, 12a.

SC was a low functioning student with an IQ of 62.[6] C.A.App. 1694. He had a difficult time with social relationships. C.A.App. 1695. He was unable to understand or adequately respond to what was happening to him or to determine the result of his decisions. C.A.App. 1693-1695. Based upon SC's limitations and a known history of sexual abuse by the same perpetrator, this was not an issue of trust. It was an issue of SC's capacity to understand and to protect himself. Analyzed from this perspective, the January 2001 bathroom incident was highly predictable, and the school was deliberately indifferent when Edelstein failed to follow Traveis's directive to monitor SC and to separate him from RC.

The court of appeals compared this case to *Gabrielle M. v. Park Forest-Chicago Heights, Illinois Sch. Dist. 163*, 315 F.3d 817 (7th Cir 2003), a case involving a non-disabled child. "In *Gabrielle M.*, school officials initially suspended a boy who had been sexually harassing female classmates. *Id.* at 819. After the boy returned to school, administrators eventually allowed the boy to return to lunchtime and recess with the classmates, but asked aides to keep an eye on him. *Id.* at 819-20. The Seventh Circuit held that this was not an unreasonable response to the known risk that the boy might harass his classmates again." App. A, 14a.

The First Circuit's analogy to *Gabrielle M.* overlooks that Edelstein failed to adhere to the remedial plan to monitor SC and separate him from RC. More importantly, it disregards that the plan was critical to keep SC safe from sexual harassment based on his special needs.

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[6] People with an IQ of 65 often live in situations where they have constant supervision. C.A.App. 1695.

An effective remedy must take into account SC's disability. "Permitting a school district to avoid liability on the basis of some minimalist ineffective response to discrimination would be inconsistent with the Supreme Court's ruling that responses which are 'clearly unreasonable' constitute deliberate indifference." *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260-261 (6th Cir. 2000).

The court of appeals also distinguished SC's case from *Williams v. Board of Regents*, 477 F.3d 1282 (11th Cir. 2007), but the cases are truly analogous once SC's disability is factored into the analysis. In *Williams*, a student athlete had been disciplined by two colleges for sexual assault and sexual harassment two years prior to attending the University of Georgia. *Id.* at 1290. "The interventions by the student's former schools -- dismissal of the student from one school and dismissal from the other's basketball team -- had not been successful in curbing the student's inappropriate sexual behavior. Based on her claims that the defendants failed to properly instruct or supervise the student to make sure that he did not sexually assault persons affiliated with the university, the plaintiff adequately alleged that the defendants exhibited 'deliberate indifference' to an obvious consequence of their action, i.e., another sexual assault." *Id.* at 1296; App. A, 14a.

In contrast to the analysis of the Eleventh Circuit in *Williams*, the First Circuit found that "[a]fter Traveis's intervention in [October 2000], Tewksbury reasonably believed that it had been successful in stopping RC's inappropriate behavior." App. A, 14a. Tewksbury's belief that Traveis's intervention was successful is clearly unreasonable when considered in relationship to SC's disability and special educational needs. C.A.App. 1704-1705. SC was educated in a life skills classroom. App. A, 4a. Expert witness, Dr. Edward Dragan, testified that SC

needed clear, repetitious instruction on issues of sexual harassment including role-playing and social skill development to provide him with a safe environment.[7] C.A.App. 1699, 1705. This is required for a child of SC's IQ and low level of functioning. C.A.App. 1705.

This case is analogous to the *Williams* case because Tewksbury failed to properly instruct and supervise SC consistent with his special needs to keep him safe from sexual harassment. Traveis's intervention did not take into account SC's disability or special educational needs. He met with the boys once and never discussed any specifics about the October incidents; he never asked the boys what they were doing or explained to them why the behavior was inappropriate. C.A.App. 1372-1374.[8] Nor did Traveis utilize SC's special education plan to remedy sexual harassment. C.A.App. 1704-1705. Instruction, counseling and supervision surrounding sexual behavior were not included in the plan. C.A.App. 1374-1377.[9] In spite of the boys' known limitations, Traveis believed they understood the behavior was inappropriate because they apologized. C.A.App. 1373-1374. Considering SC's disability,

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[7] Dr. Dragan has a doctoral degree in education administration and supervision. He is a certified school administrator, superintendent, principal, special education teacher and regular education teacher. C.A.App. 1685-1686.

[8] Traveis had no educational background in sexual abuse and attended one training in sexual harassment and abuse in his 39-year career. C.A.App. 1362, 1365.

[9] Traveis concealed the October 2000 incidents of sexual harassment from Mrs. Porto when she raised the issue of supervision with him at a November 2000 educational team meeting. C.A.App. 1376-1377. Thus, the Portos were denied the opportunity to request remedial services under the plan.

Tewksbury exhibited deliberate indifference to an obvious consequence of their action, another sexual assault.

The failure to consider a child's disability and special needs in the deliberate indifference analysis deprives children with disabilities protection from sexual harassment under Title IX.

CONCLUSION

For each of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 06-1994, 06-2139

[Filed May 30, 2007]

ANN MARIE PORTO, Individually and on behalf of SC, a minor person with a disability; NICHOLAS PORTO, Individually and on behalf of SC, a minor person with a disability,
Plaintiffs, Appellees,

v.

TOWN OF TEWKSBURY,
Defendant, Appellant,

TOWN OF TEWKSBURY PUBLIC SCHOOLS; TOWN OF TEWKSBURY SCHOOL COMMITTEE; CHRISTINE L. MCGRATH; JAMES MCGUIRE; KEVIN P. MCARDLE; PAULINE KING; LOREEN R. BRADLEY; MICHELINA DEANGELIS; CHERYL D. PORCARO; CAROLE A. GALLO; JENNIFER A. FIORE; JULIE E. BOSSDORF-PARAS; ELEANOR EDELSTEIN;

ROBERT WARE; SHARON J. MOSER;)
WILLIAM X. TRAVEIS; KARA M. BUCKLEY;)
ALLISON DIXON,)
Defendants.)
)

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JUDGES: Before Torruella and Lynch, Circuit Judges, and Lisi,* District Judge.

OPINION

TORRUELLA, ***Circuit Judge.*** This case asks us to determine when a school system may be liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, for student-on-student sexual harassment. In *Davis* v. *Monroe County Board of Education*, the Supreme Court stated that a school system may not be held liable for student-on-student sexual harassment unless the system has been "deliberately indifferent," which, in the Title IX context, requires that the school system's response to harassment be "clearly unreasonable in light of the circumstances." 526 U.S. 629, 648 (1999). Ann Marie Porto and Nicholas Porto sued the Town of Tewksbury ("Tewksbury") in their individual capacities and on behalf of a minor child, SC, alleging that the school system had been deliberately indifferent to the sexual harassment of SC by a peer. The case proceeded to trial, and the jury found in favor of the Portos, awarding compensatory damages of $ 250,000 and punitive damages of $1. The district

* Of the District of Rhode Island, sitting by designation.

court also awarded attorneys' fees to the Portos. Tewksbury now appeals the jury verdict, various evidentiary rulings, the jury instructions, the damages award, and the amount of attorneys' fees awarded. After careful consideration, we find that the evidence presented at trial is insufficient to sustain the jury's conclusion that Tewksbury was deliberately indifferent to the student-on-student sexual harassment, and as such, we vacate the judgment in favor of the Portos and direct that judgment be granted in favor of Tewksbury.

I. *Background*

SC was born in March 1987. Shortly after his birth, SC was placed in foster care. In 1989, SC's aunt, Ann Marie Porto, and her husband, Nicholas Porto, took in SC as a foster child. After SC came to live with the Portos, they noticed that SC was experiencing developmental problems, and they took him to various hospitals, where he was diagnosed as suffering from fetal alcohol syndrome and "generalized developmental delays."

SC entered the Tewksbury public schools when he was eight years old. Although the Massachusetts Department of Education identified SC as being developmentally and mentally disabled, and thus eligible for special education services, he initially was placed in a standard first grade class. But after a month, SC's teacher thought he needed more specialized attention, and he was placed in special education classes, where he stayed for the remainder of his tenure in the Tewksbury schools.

SC met another boy, RC, in his first grade special education class. Between first and fifth grade, SC reported to Ann Marie

Porto various sexually-charged incidents with RC.[1] Porto testified that she reported these incidents to Tewksbury teachers and administrators. In 1999, when SC was in the fifth grade, the Portos took him to see a psychologist, Dr. Bradford Smith, for counseling related to inappropriate sexual behavior at home. After his consultation with SC, Dr. Smith informed the Portos that SC had told him that he and RC had been engaging in oral sex on the school bus since October 1998. The Portos reported this to Tewksbury public school administrators and to the Massachusetts Department of Social Services. In response, the school put SC and RC on different buses and instructed teachers and school aides to keep SC and RC separated and to monitor their interaction.

During the sixth grade, there was only one additional reported incident involving SC and RC, in which RC allegedly touched SC on the buttocks and SC elbowed him in response. The school separated SC and RC and gave SC detention. Apart from this incident, Ann Marie Porto testified that she perceived that SC enjoyed school during his sixth grade year.

In the fall of 2000, SC entered the seventh grade at Wynn Middle School. SC spent a large part of the day in a life skills class with six other children, one of whom was RC. The life skills class was team taught, with one teacher covering language arts and math in the morning, and a different teacher covering social studies and science in the afternoon. Although

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[1] The district court ruled that for the purposes of the Porto's Title IX claim, the jury could only consider harassment that occurred between October 2000 and January 2001. Neither party appeals this ruling, and we do not disturb it on appeal. However, the court ruled that the Portos could present evidence of harassment prior to October 2000 for the purpose of proving that Tewksbury had knowledge that harassment was likely to occur between RC and SC.

there were three different classroom aides who at various times helped with the class, all three were not typically assigned to the class at a given time, and one often accompanied a child who was in a wheelchair.

According to school officials, there were three incidents in October 2000 that involved inappropriate touching between RC and SC. Two of the incidents occurred in the life skills class room. Both incidents involved RC touching SC's leg while they were sitting next to each other. In one instance, an aide ordered SC and RC to separate, and they complied. In another, an aide sat down between SC and RC to keep them apart. There was also a third incident, during gym class, when SC and RC were touching each other while sitting in the bleachers. Eleanor Edelstein, RC and SC's language arts and math teacher, testified that she heard a verbal description of one of the classroom incidents involving inappropriate touching under a workstation table.

After the third incident, the boys were sent to the school guidance counselor, William Traveis. Traveis instructed the boys that this type of behavior was inappropriate. According to Traveis, the boys apologized and told him that they would not do it again. Traveis testified that he thought the boys understood the discussion, and that he told teachers and aides to monitor them and keep them separated. No additional incidents were reported to the school until January.

On the morning of January 11, 2001, RC asked Edelstein for permission to go to the bathroom, and Edelstein excused him. A short time later, SC asked Edelstein if he could get a book from his locker. No aide was present at the time to accompany either RC or SC. There is no evidence that either boy had previously misled Edelstein with respect to similar requests. Edelstein allowed SC to leave the classroom. After

two or three minutes, Edelstein noticed that neither of the boys had returned. She stepped out into the hall to look for them, but did not see them. While in the hall, Edelstein spotted Robert Ware, the Behavior Management Facilitator at Wynn Middle School, and asked him to go into the bathroom to investigate. Ware entered the bathroom and discovered SC and RC in a stall, pulling their pants up. Ware took the students to his office and asked them what they had been doing. SC told Ware that he had engaged in sexual intercourse with RC, and that he and RC had been touching each other on a weekly basis for some time. Ware informed James McGuire, the principal of Wynn Middle School, about the incident. McGuire called SC's parents, told them what had happened, and asked them to pick up SC from school.

SC did not return to school after the incident with RC. Between January and October 2001, SC remained at home, receiving ten hours of tutoring per week. In October 2001, SC was hospitalized for a month for behavioral problems, during which time SC attempted to commit suicide. From November 2001 until February 2002, SC participated in a daytime academic and counseling program at the Bournewood Hospital. Finally, in February 2002, SC was sent to a residential treatment program outside of the Tewksbury school district.

The Portos filed suit against Tewksbury on January 5, 2004, alleging that, because it was deliberately indifferent to RC's sexual harassment of SC, Tewksbury had violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*[2] The case proceeded to a jury trial, which lasted from

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[2] The Portos also alleged that Tewksbury discriminated against SC on the basis of his disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* The jury found in favor

October 3 until October 21, 2005. After the Portos presented their case to the jury, Tewksbury moved for a directed verdict pursuant to Fed. R. Civ. P. 50(a), arguing that the Portos had failed to prove any element of their case. The court denied Tewksbury's motion, and after one day of deliberations, the jury returned a verdict in favor of the Portos, awarding $250,000 in compensatory damages and $1 in punitive damages. Tewksbury then filed a motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b), again arguing that the Portos had failed to satisfy their burden on any element of the case.[3] The court denied the motion by written order on April 28, 2006. Tewksbury now appeals.

II. *Motion for Directed Judgment*

We review the denial of a Rule 50 motion *de novo*. *Walton* v. *Nalco Chem. Co.*, 272 F.3d 13, 23 (1st Cir. 2001). "We must affirm unless the evidence was 'so strongly and overwhelmingly' inconsistent with the verdicts that no reasonable jury could have returned them." *Id.* (quoting *Negron*

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of Tewksbury on this claim, and the Portos do not appeal that aspect of the verdict. In addition, the Portos brought various Massachusetts law claims against Tewksbury, which were later dismissed, and the Portos do not appeal this decision. Finally, the Portos initially brought claims under 42 U.S.C. § 1983 against various individuals who worked for the Tewksbury public school system, but later voluntarily dismissed them.

[3] Tewksbury also filed a motion for a new trial, arguing that the court improperly admitted certain testimony and misinstructed the jury. Because we find that Tewksbury's motion for a directed verdict should have been granted based on the evidence that was deemed admissible by the district court, we need not decide the correctness of the evidentiary rulings or instructions.

v. *Caleb Brett U.S.A., Inc.*, 212 F.3d 666, 668 (1st Cir. 2000)). Thus, to reverse, we must find that there was "a total failure of evidence to prove plaintiff's case." *Mayo* v. *Schooner Capital Corp.*, 825 F.2d 566, 568 (1st Cir. 1987) (quoting *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1064 (1st Cir. 1980)) (internal quotation marks omitted). We draw "all reasonable inferences" from the evidence presented at trial in favor of the prevailing party. *Negron*, 212 F.3d at 668.

Under Title IX of the Education Amendments of 1972, a recipient of funding from the United States Department of Education may be liable for damages if "its deliberate indifference [to peer-on-peer sexual harassment] 'subjects' its students to harassment." *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 644 (1999). A funding recipient is deliberately indifferent to student-on-student harassment when "the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* at 648. "[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645 (alteration in original) (quoting Random House Dictionary of the English Language 1415 (1966)). In addition, the acts of sexual harassment must be "known" to the funding recipient. *Id.* at 647. Finally, the harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 650.

Thus, a funding recipient is not liable under Title IX for all student-on-student sexual harassment. First, the plaintiff must show (1) that he or she was subject to "severe, pervasive, and objectively offensive" sexual harassment by a school peer, and (2) that the harassment caused the plaintiff to be deprived of educational opportunities or benefits. Even then, *Davis* restricts

a funding recipient's liability under Title IX for student-on-student sexual harassment to situations where (3) it knew of the harassment, (4) in its programs or activities and (5) it was deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of the known circumstances.

For the purposes of this appeal, we assume (without deciding) that SC was subject to severe, pervasive, and objectively offensive harassment by RC, that Tewksbury is a funding recipient and had actual knowledge in 2001 of at least some prior incidents of inappropriate sexual behavior, and that the harassment deprived SC of educational opportunities or benefits.[4] Even making these assumptions, we do not think that the Portos presented sufficient evidence such that a rational jury could have concluded that Tewksbury was *deliberately indifferent* to the harassment of SC. The Portos argue that Tewksbury was told on multiple occasions that RC was harassing SC, but that the school did nothing more than temporarily separate the boys. The Portos also note that in spite of Tewksbury's knowledge of the prior sexual harassment, RC and SC were allowed to have unsupervised access to each other at times. The Portos contend that, given the history of sexual harassment between RC and SC that culminated in the school-bus incident in fifth grade, Tewksbury should have not allowed SC to go to his locker alone while RC was in the bathroom. The Portos point to evidence of a prior directive from Tewksbury to teachers and aides that RC and SC not be allowed to travel alone together in or outside the school building.

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[4] Thus, we explicitly do not decide whether a minor student's "consent" to sexual conduct is a factor in determining whether that student was subject to sexual harassment.

The problem with the Portos' argument is that it suggests only that Tewksbury perhaps should have done more to prevent RC from sexually harassing SC. However, a claim that the school system could or should have done more is insufficient to establish deliberate indifference; in the Title IX context, "funding recipients are deemed deliberately indifferent to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. The Supreme Court has described deliberate indifference as "a stringent standard of fault, requiring proof that a municipal actor disregarded a *known or obvious* consequence of his action" or inaction. *Bd. of the County Comm'rs* v. *Brown*, 520 U.S. 397, 410 (1997) (emphasis added). Thus, before holding a municipality liable for a police officer's excessive force, we have required plaintiffs to prove that the municipality knew that the excessive force would be a "plainly obvious consequence" of hiring the officer. *Crete* v. *City of Lowell*, 418 F.3d 54, 66 (1st Cir. 2005); *see also Young* v. *City of Providence*, 404 F.3d 4, 28 (1st Cir. 2005) (holding that a reasonable jury could find deliberate indifference where excessive force was a "highly predictable consequence" of the municipality's failure to train its police officers (quoting *Brown*, 520 U.S. at 409). Likewise, in *Bisbal-Ramos* v. *City of Mayaguez*, we found that the evidence was sufficient to support a finding of deliberate indifference by a supervisor where a municipal employee turned city hall into the campaign headquarters for a candidate, with the obvious consequence that employees who were supporters of the rival candidate would feel that they had been discriminated against in violation of their First Amendment rights. 467 F.3d 16, 25 (1st Cir. 2006). In the educational setting, we have suggested that a school might be deliberately indifferent to a teacher's sexual harassment of a student where it had notice of the sexual harassment, and either did nothing or failed to take additional

reasonable measures after it learned that its initial remedies were ineffective. *Wills* v. *Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999).

The Portos do not claim that Tewksbury did nothing to address RC's sexual harassment of SC. They acknowledge that Tewksbury separated SC and RC after each episode of sexual harassment and later had the school guidance counselor intervene. *Compare with Doe ex rel. A.N.* v. *E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006) (unpublished) (finding deliberate indifference where "alleged victim of a rape complained of verbal harassment based on her sex and related to the rape for five weeks before authorities took concrete action to get the perpetrators of the harassment to stop"). Rather, the Portos claim that these measures were ineffective. There is no doubt that the bathroom incident is evidence that RC's inappropriate sexual behavior was not abated. However, the fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by Tewksbury at the time. The test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight.

The Portos' proof is inadequate on several different levels. First, there was no evidence presented at trial to suggest that Tewksbury knew or even suspected that when SC asked to go to his locker, he was really going to go to the bathroom to meet RC. The Portos suggest that because SC was mentally disabled, it would have been prudent to have had a teacher's aide accompany him to his locker. However, this suggests only that Tewksbury may have been negligent; to prove deliberate indifference, the Portos had to show at least that Tewksbury *knew* that the failure to accompany SC to his locker would lead to SC following RC to the bathroom and that there was a high

degree of risk that SC would be subject there to inappropriate sexual behavior by RC. Edelstein offered uncontradicted testimony that the boys had never given a "reason for [her] to ever question that they couldn't be trusted going to the bathroom or going to a locker," and that she "trusted that they would follow the rules." Thus, there was no evidence that anyone had a reason to suspect that SC intended to deceive Edelstein when he asked for permission to visit his locker.

Furthermore, there was no evidence that the school knew or that it was obvious that RC would continue to sexually harass SC after October 2000. To put the Portos' claim in context, it is important to note that between March 1999 and October 2000, there was only one alleged minor incident of sexual harassment. Apart from this, according to Ann Marie Porto, SC was generally happy at school and had no problems, and there was no evidence that Tewksbury was aware of any additional problems during this time. It was not until October 2000 that RC's inappropriate touching resumed. The first two times this occurred, the school separated the boys. After the third instance of inappropriate touching, school officials sent the boys to talk to Traveis, the school counselor. RC and SC spoke with Traveis, who testified that it was his understanding that the boys knew that what they were doing was wrong, and that they promised not to do it again. It was reasonable for Tewksbury to conclude that this intervention worked: there was no evidence presented that Tewksbury was aware of any further sexual harassment by RC between Traveis's intervention in October 2000 and the January 11, 2001 incident.[5] Even the Portos' expert, Dr. Dragan, testified only

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[5] Nor were the Portos aware of any sexual harassment during this period. In fact, Ann Marie Porto met with school officials in November 2000, but did not report any additional instances of sexual

that Tewksbury could have done more. Thus, there was no evidence from which it could be inferred that Tewksbury had reason to believe that RC was continuing to sexually harass SC. In other words, further sexual harassment, much less sexual intercourse, was not a "known or obvious consequence" of Tewksbury's failure to accompany SC to his locker on January 11, 2001.[6]

Therefore, this is not a case, as the Portos contend, where a school "continued to use the same ineffective methods to no acknowledged avail." *Vance* v. *Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000). By all indications, Tewksbury's methods were working: until January 11, 2001, Tewksbury was not aware that RC had been engaging in any further sexual harassment after October 2000. Nor is this case analogous to *Williams* v. *Board of Regents*, 477 F.3d 1282 (11th Cir. 2007), where the Eleventh Circuit found that the plaintiff had adequately alleged that University of Georgia was deliberately indifferent when it failed to properly instruct or supervise a student athlete who had recently been accused of sexual harassment while attending another institution. In *Williams*, prior to attending the University of Georgia, a student athlete had been disciplined by two colleges for sexual assault and sexual harassment. *Id.* at 1290. Thus, recent history suggested that the interventions by the student's former schools — dismissal of the student from one school and dismissal from

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harassment between SC and RC. There was, however, evidence that the harassment did continue unbeknownst to Tewksbury.

[6] Likewise, the fact that Tewksbury did not have a sexual harassment policy that complied with Department of Education regulations is insufficient to establish deliberate indifference; the Portos have not offered any evidence that would permit the inference that RC's harassment was a known consequence of such noncompliance.

the other's basketball team — had not been successful in curbing the student's inappropriate sexual behavior. Based on her claims that the defendants failed to properly instruct or supervise the student to make sure that he did not sexually assault persons affiliated with the university, the plaintiff adequately alleged that the defendants exhibited "deliberate indifference" to an obvious consequence of their inaction, *i.e.*, another sexual assault. *Id.* at 1296. In the present case, the evidence clearly shows that after Traveis's intervention, Tewksbury reasonably believed that it had been successful in stopping RC's inappropriate behavior. Because continued sexual harassment was not a "known or obvious consequence" of the school's inaction as in *Vance* and *Williams*, Tewksbury cannot have been deliberately indifferent to SC's plight.

More analogous to the situation in this case is *Gabrielle M.* v. *Park Forest-Chicago Heights, Illinois School District 163*, 315 F.3d 817 (7th Cir. 2003). In *Gabrielle M.*, school officials initially suspended a boy who had been sexually harassing female classmates. *Id.* at 819. After the boy returned to school, administrators eventually allowed the boy to return to lunchtime and recess with the classmates, but asked aides to keep an eye on him. *Id.* at 819-20. The Seventh Circuit held that this was not an unreasonable response to the known risk that the boy might harass his classmates again:

> *Davis* [v. *Monroe County Board of Education*, 526 U.S. 629 (1999)] does not require funding recipients to remedy peer harassment. *Davis* disapproved of a standard that would force funding recipients to suspend or expel every student accused of misconduct. All that *Davis* requires is that the school not act *clearly unreasonably* in response to known instances of harassment. Here, in light of each of the immediate disciplinary and preventative steps the school district

> had already taken in response to Jason's conduct, including most prominently the decisions to move him to another class entirely and eventually to grant Gabrielle's request for a school transfer, it was not clearly unreasonable as a matter of law initially to assign an instructor to oversee a communal recess and lunch period instead of immediately rescheduling the lunch and recess period for a whole kindergarten class.

Id. at 825 (internal citations omitted). Likewise, Tewksbury acted reasonably in responding to RC's inappropriate touching by separating RC and SC and sending them to the guidance counselor. Thus, drawing all inferences favorable to the Portos, the evidence in this case overwhelmingly fails, as a matter of law, to demonstrate that Tewksbury acted with deliberate indifference in failing to address RC's sexual harassment of SC. Therefore, the Portos cannot prevail on their claim, and the district judge should have granted Tewksbury's motion for a directed verdict.[7]

III. *Conclusion*

For the foregoing reasons, we reverse the judgment of the district court, and remand with instructions to the district court

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[7] Because we find that the evidence presented at trial was insufficient, we see no reason to reach Tewksbury's claims as to damages. Likewise, as we noted before, we need not address Tewksbury's claims regarding evidentiary rulings or jury instructions. Finally, because we have vacated the judgment against Tewksbury, we also vacate the judgment awarding attorneys' fees to the Portos. *See* 42 U.S.C. § 1988(b) (authorizing, in the discretion of the district judge, the award of attorneys' fees to the prevailing party).

to enter judgment in favor of Tewksbury. No costs to either party.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-10003-PBS

[Filed April 28, 2006]

ANN MARIE PORTO and	)
NICHOLAS PORTO,	)
Individually and on Behalf of	)
SC, a Minor Person with	)
a Disability,	)
Plaintiffs,	)
	)
v.	)
	)
TOWN OF TEWKSBURY,	)
Defendant.	)
	)

JUDGES: PATTI B. SARIS, United States District Judge.

MEMORANDUM AND ORDER

I. INTRODUCTION

This is a peer-on-peer sexual harassment case involving two mentally handicapped adolescent boys in middle school in

Tewksbury, Massachusetts.[1] On October 21, 2005, after a ten-day trial, the jury returned a verdict for the plaintiff on his Title IX claim that he was sexually harassed by another boy of the same mental handicap, awarding him $250,000 in compensatory damages and $1 in punitive damages. Defendant has filed a motion for judgment as a matter of law or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 50(b). (Docket No. 119.) Plaintiff moves for attorneys' fees, costs, and prejudgment interest. (Docket No. 118.) After hearing and review of the supplemental briefs, Defendant's motion is ***DENIED.*** I also address Plaintiff's request for interest under state law and attorneys' fees.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW

A. *Standard*

Defendant moves for judgment as a matter of law or, alternatively, for a new trial. "A party seeking to overturn a jury verdict faces an uphill battle." *Rivera v. Turabo Med. Ctr. P'ship*, 415 F.3d 162, 167 (1st Cir. 2005). "Courts may only grant a judgment contravening a jury's determination when 'the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party.'" *Rivera Castillo v. Autokirey, Inc.*, 379 F.3d 4, 9 (1st Cir. 2004) (quoting *Keisling v. SER-Jobs for Progress, Inc.*, 19 F.3d 755, 759-60 (1st Cir. 1994)). In deciding such a motion a court must consider all evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, without making credibility determinations or

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[1] The Court issued a Memorandum and Order dated June 17, 2005 (Docket No. 38) setting forth the factual background.

weighing the evidence. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *Rivera Castillo*, 379 F.3d at 9.

B. *Application*

As the Court instructed the jury, to prevail on his Title IX claim, Plaintiff had to prove by a preponderance of the evidence that he was sexually harassed by Richard, the other boy. The Court further instructed that "if you find that Stephen initiated the sexual touching on any given occasion, he was not the subject of sexual harassment on that occasion." (Jury Inst. No. 13.) Defendant vigorously argues that there is insufficient evidence to prove that Richard was the initiator of the sexual conduct which occurred in the bathroom of the Wynn Middle School on January 11, 2001 and precipitated Stephen's leaving the school permanently.

The identity of the initiator of the sexual conduct in the bathroom was a subject of much dispute throughout the trial, and evidence was presented implicating both Stephen and Richard on that score, including contradictory statements by the boys. Additionally, both boys are profoundly mentally impaired, making factual disputes and credibility determinations particularly difficult to resolve. It was the jury's job to resolve this factual question, based upon its assessment of the evidence. As such, if sufficient evidence was presented that Richard was the initiator of the sexual conduct in the bathroom, the Court will not override the jury's decision even if some contradictory evidence was admitted. *See Attrezzi, LLC v. Maytag Corp.*, 436 F.3d 32, 37 (1st Cir. 2006) (stating that to overturn a jury's verdict there must be "a total failure of evidence to prove plaintiff's case" (quoting *Mayo v. Schooner Capital Corp.*, 825 F.2d 566, 568 (1st Cir. 1987)).

In the case at bar, while the evidence was close, properly admitted non-hearsay evidence exists in the record to support a conclusion that Richard initiated the sexual contact with Stephen in the bathroom on January 11, 2001.

Stephen indicated on the stand that he feared Richard, even though neither party's counsel asked him directly who initiated the contact in the bathroom on January 11, 2001. Stephen reported that he was afraid of Richard and would obey him out of fear that Richard would tell the other students that Stephen touched him sexually. (Trial Tr. 6:22, Oct. 17, 2005.) He also testified that Richard "would always try to touch" his private parts, sometimes in the bathroom. (Trial Tr. 6:11-12, Oct. 17, 2005.)

Stephen's fear of Richard is corroborated by the January 21, 2001 report of Elizabeth Stasio-Englehart, the state investigator who investigated the bathroom incident. The report was admitted into evidence as Exhibit 27 under the public records exception, Fed. R. Evid. 803(8)(C). To be sure, statements by third parties are not admissible solely because they are printed in a public record. *See Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991). The Court instructed the jury that the report's findings as to the substance of the statements made to the DSS were hearsay and were admitted to provide the basis for the DSS's ultimate conclusion. (Trial Tr. 6:58-59, 78, Oct. 17, 2005.) In her report, Ms. Stasio-Englehart describes her conversation with Stephen, in which he described feeling forced to engage in sexual acts with Richard out of fear that Richard would beat him up or tell others he was gay. (Ex. 27 at 5.) Stephen's statements regarding his fearful then-existing state of mind with respect to Richard one week after the incident were admissible pursuant to Fed. R. Evid. 803(3).

The harder question is whether the jury could have considered these prior statements to DSS in assessing Stephen's credibility in his trial testimony that Richard was the initiator. The defense highlighted evidence of inconsistent statements made by Stephen on January 24, 2001 at a school meeting with the teacher, principal, district attorney, foster mother, and others to support its thesis that Stephen admitted to his teacher he was the initiator, but was lying about it now because he was afraid of his foster mother who threatened to throw him out of the house if he initiated the sex.[2] (Trial Tr. 8:47, Oct. 19, 2005.) In the instructions of law, the Court made clear to the jury that prior inconsistent statements by a witness before trial could be used to help make credibility determinations. (Jury Instr. No. 9.)

Generally speaking, prior consistent statements are hearsay which cannot be used to bolster a witness's credibility. However, Stephen's before-court statements to the DSS investigator during the meeting on January 18, 2001 (one week after the incident), could be considered as prior consistent statements by a witness to rebut the charge of recent fabrication or improper influence because of the threats of the foster mother at the later "SAIN" meeting on January 24, 2001. Under Fed. R. Evid. 801(d)(1)(B), these consistent statements are separately admissible, are "not hearsay" according to the rule, and could have been used to assess Stephen's credibility.

This evidentiary issue of the admissibility of Stephen's statements to the DSS investigator as non-hearsay under Section 801(d)(1)(B) was not raised at trial. Accordingly,

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[2] Plaintiff has argued consistently that it does not matter who initiated the contact, but I have rejected this legal position with respect to the Title IX claim.

because I instructed the jury that the statements were hearsay, they unlikely considered the statements other than for purposes of assessing credibility and Stephen's state of mind.

The testimony of Dr. Bradford Smith, a defense witness, provides stronger evidence that Richard was the initiator. Dr. Smith is a clinical psychologist who began treating Plaintiff in 1999 and treated him after the bathroom incident.

On cross-examination, Dr. Smith testified that Stephen had told him during one of their sessions that it was Richard who had initiated the sexual contact in the bathroom. (Trial Tr. 7:97-98, Oct. 18, 2005.) Dr. Smith testified as follows:

Q. Okay. And there have been several references to the notes today regarding the sexual contact in January, 2001, in that area. It's fair to say that there were several disclosures to you from Stephen, and from Mrs. Porto in fact, that Richard had initiated sexual contact with Stephen; isn't that correct?

A. There are — there are some disclosures in there that Richard had initiated.

Q. Okay. And do you recall that Richard had asked him if he wanted to do it?

A. That Stephen reported that?

Q. Yes.

A. Yes.

Q. Okay. And do you recall that Stephen reported that Richard told him to face the wall, and he put his penis in his bum?

A. Yes.

Q. And do you recall that there was a report that Stephen was afraid he would be take advantage of?

A. I don't remember that.

Q. Okay, well, let me refresh your memory. Do you see a note that says "Afraid he'll be taken advantage of"?

A. Yes.

(Trial Tr. 7:97-98, Oct. 18, 2005.)

Although Dr. Smith was testifying as to an out-of-court statement by Stephen, the Court admitted the evidence under the hearsay exception for statements for purposes of medical diagnosis or treatment. *See* Fed. R. Evid. 803(4); *see also Danaipour v. McLarey*, 386 F.3d 289, 297 n.1 (1st Cir. 2004) (holding that an identification of an abuser by a child is admissible under Rule 803(4) if the statement was for diagnosis or treatment). The jury had admissible evidence that Stephen, who was both extremely impaired and sometimes berated by his volatile foster mother, would have felt safest and freest to tell the truth within the confines of the doctor's office. *See* Fed. R. Evid. 803(4) advisory committee's note (noting the patient's "strong motivation to be truthful"). This evidence supports the jury's finding that Richard was the initiator in the bathroom. In addition, the evidence at trial demonstrated that

Stephen was attracted to girls (i.e., his foster sister, "M"), not boys.

When all logical inferences are drawn in favor of the plaintiff, there is sufficient evidence to support a determination that Richard initiated the sexual conduct with Stephen in the bathroom on January 11, 2001 and at other times.

Defendant also argues that there is insufficient evidence to support the jury's verdict on the remaining elements of Plaintiff's Title IX claim. After review of the evidence, the Court finds that sufficient evidence exists to support the jury's verdict. Defendant's motion is ***DENIED*** (Docket No. 119).

III. INTEREST

Another issue the Court must resolve is the rate of interest to assess for the jury's damage award. Plaintiff requests interest at the Massachusetts statutory rate: 12 percent per annum running from the date the complaint was filed. Mass. Gen. Laws ch. 231, § 6B. However, the award of the state interest rate is contingent upon Plaintiff's prevailing on a state cause of action.

In this case, the plaintiff did not prevail on his state cause of action under Mass. Gen. Laws ch. 231, § 1C, but did succeed on his federal cause of action under Title IX. In short, Massachusetts state law does not yet recognize a claim for peer-on-peer sexual harassment. In the only case to address the issue, the Massachusetts Commission Against Discrimination refused jurisdiction over such a claim. *Buschini v. Newburyport Public Schs.*, 18 MDLR 216, at * 2 (Mass. Comm. Discrim. 1996) ("Setting aside the question as to whether seven year olds can engage in or experience sexual harassment . . ., I find no support for the proposition that an educational institution

can be vicariously liable for the behavior of one student towards another. . . .").

As the plaintiff succeeded on his federal claim, but not his state claim, he is entitled to the federal interest rate for civil cases under 28 U.S.C. § 1961.

IV. ATTORNEY'S FEES AND COSTS

Plaintiffs, as prevailing parties, are seeking $302,835.27 in attorneys' fees, and $43,535.69 in costs. Defendant challenges those fees as excessive for a variety of reasons. I address certain threshold issues and defer others. First, I do not find that Plaintiffs billed excessive time because two attorneys attended many proceedings. It is not unusual for two attorneys to attend or prepare for a deposition, or attend hearings or conferences.

Second, I award an hourly rate of $200 for Plaintiffs' counsel. Given the going rate for the most experienced civil rights lawyers (around $300-$350 an hour), I find that Plaintiffs' counsel, who are much less experienced in federal practice and civil rights law, should be reimbursed at this lower rate.

Third, the Court will not enhance the lodestar.

Finally, Plaintiffs' counsel shall recalculate hours based on core and non-core rates, and counsel shall confer to eliminate excessive, vague, or poorly documented time entries. Entries like "confer" or "discuss" are plainly inadequate and should be deleted. The time spent on the Title II claim should be deducted. Neither side can bill for this settlement conference over attorneys' fees. The revised attorneys' fees request shall

be filed in two weeks, and any opposition a week later. Only if necessary will I hold a hearing.

S/ PATTI B. SARIS
United States District Judge